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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-856

THE PECOS COUNTY STATE BANK,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

THE PECOS COUNTY STATE BANK,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO: THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

By this Petition, The Pecos County State Bank respectfully seeks a writ of certiorari to review the judgment and opinion in this case of the United States Court of Appeals for the Fifth Circuit.

I. OPINIONS OF THE COURT BELOW

The District Court did not write an opinion, though it did make and enter findings of fact and conclusions of law, with its summary judgment. The opinion of the Court of Appeals is appended hereto as Appendix "A". It is reported in 466 F. 2d 1040.

II. JURISDICTIONAL STATEMENT

The judgment sought to be reviewed, a copy of which is appended hereto as Appendix "B", is dated and was entered on September 7, 1972. An order denying a rehearing, a copy of which is appended hereto as Appendix "C", was entered on October 31, 1972. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question is Section 1254 of Title 28, United States Code.

III. QUESTIONS PRESENTED

1. Whether liens for withholding and FICA taxes against property rights of a taxpayer are paramount over other interests competing therewith which are not made superior to the tax lien by Section 6323 of the Internal Revenue Code, without regard to the times the liens and interests attached to the property and, in the case of the competing interests, became choate.

2. Whether, in after-acquired property situations, interests competing for priority with federal tax liens must be choate some time in advance of the time the taxpayer has any interest in the "property or right of property".

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IV. STATUTES WHICH THE CASE INVOLVES

The statutes involved in this case, all of which are set forth verbatim, together with the official citations thereof, in Appendix "D" appended hereto, are:

Section 6321 of the Internal Revenue Code of 1954 (Section 3670 of the Internal Revenue Code of 1939)

Section 6323 of the Internal Revenue Code of 1954 (Section 3672 of the Internal Revenue Code of 1939)

Section 6323 of the Internal Revenue Code of 1954 was amended to add several new provisions thereto in 1966. Section 6323 is reproduced in Appendix "D" as it was both before and after the 1966 amendments.

V. STATEMENT OF THE CASE

This is an interpleader suit brought in the United States District Court under the authority of Sections 1335, 1340 and 2410 of Title 28, United States Code.

In March, 1967, H. R. Blackmon and Petitioner, The Pecos County State Bank, entered into a Security Agreement, executed and filed a Financing Statement and perfected a security interest in all of Blackmon's present and future accounts receivable to secure present and future indebtedness, under the Texas adaptation of the Uniform Commercial Code, Chapter 9, Texas Business and Commercial Code (Court of Appeals Appendix pp. 21-31).

In December, 1969, and January, 1970, the Internal Revenue Service made tax assessments against Mr. Blackmon aggregating $54,746.40, and on February 27, 1970, it filed its notice of the tax liens (Court of Appeals Appendix p. 16). The Petitioner became aware of the tax liens after October 22, 1970 (Court of Appeals Appendix p. 25).

During September, October and November, 1970, Mr. Blackmon, doing business as Blackie's Oil and Gas Field Service, performed 21 jobs for Texas Oil and Gas Corp., and during that time submitted 21 invoices for the 21 jobs, as they were completed (Court of Appeals Appendix pp. 21-24). On each of the 21 occasions, Mr. Blackmon owed Petitioner specific sums of money secured by all of Mr. Blackmon's accounts receivable, with the principal amount of such debts ranging from a high of $44,605.34, to a low of $15,934.48 (Court of Appeals Appendix pp. 24-25).

With both Petitioner and Respondent demanding that it pay to them the amounts it owed Mr. Blackmon, Texas Oil and Gas Corp. paid into the registry of the District Court the sum total of the 21 invoices, $14,690-.10, for payment over to Petitioner, to Respondent or to Mr. Blackmon, as their respective rights might appear (Court of Appeals Appendix pp. 1, 12-14).

The Government's claim is for withholding and FICA taxes. It has never claimed that H. R. Blackmon is or has been insolvent within the meaning of Section 191 of Title 31, United States Code (Court of Appeals Appendix pp. 15-17). In competing summary judgment

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procedures, the trial court awarded all of the funds interpled to the United States, denying Petitioner any share or portion thereof (Court of Appeals Appendix p. 38), and the Court of Appeals affirmed that judgment. These actions were against Petitioner's contention that it was entitled to share in each invoiced amount in the relation that the amount Mr. Blackmon owed to it at the time such invoiced amount came into existence bears to the total of the debt owed on such occasion to both Petitioner and Respondent, under the theory that the interests of Petitioner and Respondent attached to each account at the same instant in time.

VI. REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided federal questions in a way in conflict with the decision of this Court in *United States vs. City of New Britain*, 347 U.S. 81, 98 L. ed. 520, 74 S. Ct. 367 (1954).

VII. ARGUMENT

A withholding and FICA tax lien against a property right of a solvent taxpayer may never be superior to choate interests competing for priority therewith, unless the tax lien attaches to such property before the competing interests attach thereto. If the tax liens and then choate other interests attach simultaneously, they all are equal to each other, and share equally with each other in the property right.

Before this Court unanimously decided *United States vs. City of New Britain*, 347 U.S. 81, 98 L. ed. 520, 74 S. Ct. 367 (1954), some thought that federal tax liens were superior to all other interests, unless Congress had afforded the other interests a priority under Section 3672 of the Internal Revenue Code of 1939[1]. See Mr. Justice Jackson's concurring opinion in *United States vs. Security Trust & Savings Bank*, 340 U.S. 47, 95 L. ed. 53, 71 S. Ct. 111 (1950); *United States vs. Graham*, 96 F. Supp. 318, 321 (U.S.D.C. S.D., Cal., 1951); the Government's brief filed in this Court in the *New Britain* case, the summary of the Government's argument in the *New Britain* case, cited in 98 L. ed. 522; and the historical tax law review by Judge Friendly in *United States vs. Vermont*, 317 F.2d 446 (CA 2, 1963), and particularly footnote 7, at pages 451, 452.

In the *New Britain* case, City of New Britain had real estate tax liens which did not qualify for priority over federal tax liens under Section 3672 of the Internal Revenue Code of 1939, because the City was not a "mortgagee, pledgee, purchaser, or judgment creditor" of the taxpayer. Some of the city tax predated the federal tax liens, and some was assessed later. The Government insisted that federal tax liens are paramount in all instances, except only in those instances explicitly set forth in Section 3672 of the Internal Revenue Code of 1939, namely, as against "mortgagees, pledgees, purchasers, or judgment creditors" without

[1]The counterpart of Section 3672 of Internal Revenue Code of 1939 is Section 6323 of the Internal Revenue Code of 1954, now in effect.

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notice. This Court, which included Mr. Justice Jackson who had had a contrary opinion four years before, in his *Security Trust* concurring opinion, plainly rejected the Government's argument, holding:

> "Where the debtor is not insolvent, Congress has failed to expressly provide for federal priority, with certain exceptions not relevant here, . . ." 347 U.S., at page 85,

and

> "We believe that priority of these statutory liens is determined by another principle of law, namely, 'The first in time is the first in right,' as stated by Chief Justice Marshall in *Rankin vs. Scott* (U.S.) (12 Wheat 177, 6 L. ed. 592):
>
> > 'The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant.' 12 Wheat, at 179.
>
> This principle is widely accepted and applied, in the absence of legislation to the contrary. 33 Am. Jur., Liens, Sections 33, 53 CJS, Liens, Section 10b. We think that Congress had this cardinal rule in mind when it enacted Section 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory

> lien contested here must depend on the time it attached to the property in question and became choate." 347 U.S., at pages 85, 86 (The citation of Rankin vs. Scott, U.S., is added in lieu of the word "supra").[2]

Since 1954, this Court has had more than a dozen tax lien priority cases before it, in none of which has the Court suggested changing, or that there has been a change in, the effect of the *New Britain* decision.

The Internal Revenue Code of 1954 did not purport to change the lien and priority of lien provisions of the 1939 Code. Section 6323 of the 1954 Code was amended in 1964, but only to afford protection against tax liens to certain interests in motor vehicles. Public Law 88-272, Title II, Section 236(a), (c), (1), 78 Stat. 127, 128.

In enacting the Federal Tax Lien Act of 1966,[3] Congress amended Section 6323 of the Internal Revenue Code of 1954 to allow some more priorities, and to create "superpriorities", over federal tax liens. The 1966 revisions were thought to be a comprehensive modernization of the federal tax lien laws which "substantially improve the status of privately secured creditors". Senate Rep. No. 1708, 89th Cong., 2nd Sess., p. 2. Nothing in the words of the 1966 enactment pur-

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[2]Section 3670 of the Internal Revenue Code of 1939 and Section 6321 of the Internal Revenue Code of 1954 are the statutes which afford the United States a lien against delinquent taxpayers' "property and rights to property".

[3]Public Law 89-719, 89th Cong., 2nd Sess., approved November 2, 1966.

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ports to create any new or higher federal tax lien priority or to subordinate competing interests so as to make them poorer relations than they already were. The 1966 Act did alter the effect of some decisions of this Court dealing with real property taxes and attorney's fees as noted in House Committee Report No. 1884, 89th Cong., 2nd Sess., at pages 37 and 36, in which the cases were named specifically.[4]

Neither the *New Britain* case nor the "first in time is first in right" rule came under attack, either in the 1966 Act or in its Congressional Committee Reports.

Under the 1966 amendments, for the first time, had the Blackmon-Texas Oil & Gas Corp. accounts receivable come into existence within 45 days after the filing of the notice of tax lien, Petitioner would have been entitled to a "superpriority" over the tax liens, for advances made before the expiration of the 45 day period, since the Bank was not actually aware of the tax liens during that period. But this is not to say, as did the Court of Appeals, that federal tax liens are automatically superior to all competing interests which are not made superior to tax liens by Section 6323, such as security interests in accounts that come into existence more than 45 days after the filing of the tax lien notice. That priority determination correctly is made through the application of the "first in time

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[4]*United States vs. Buffalo Savings Bank*, 371 U.S. 228, 9 L. ed. 2d 283, 83 S. Ct. 314 (1963); *U. S. vs. Pioneer American Insurance Company*, 374 U.S. 84, 10 L. ed. 2d 770, 83 S. Ct. 1651 (1963); and *United States vs. Equitable Life Assurance Society of the United States*, 384 U.S. 323, 16 L. ed. 2d 593, 86 S. Ct. 1561 (1966).

is first in right" rule, as decreed by the *New Britain* case, unless the tax is on, and the subject matter of the lien is, distilled spirits (26 United States Code, Section 5004(a)(1)), or the taxpayer is insolvent (31 United States Code, Section 191).

There being no statutory provision that affords a priority or superpriority to either Petitioner or Respondent in the 21 accounts receivable, it is necessary, under the *New Britain* rule, to determine when the competing interests attached to each of the 21 accounts, and in the case of the Bank's interest, became choate. Thanks to the adaptation by Texas of the provisions of the Uniform Commercial Code dealing with security interests and accounts receivable, and the 1967 Security Agreement and filed Financing Statement entered into by Petitioner and Mr. Blackmon, the instant Mr. Blackmon acquired a property right in an amount owed him by Texas Oil & Gas Corp., the Bank's security interest attached thereto and became choate. At that instant, the Bank was required to take no further action, the subject of the security interest was identifiable, and the debt secured was ascertainable to the last cent. See Texas Business and Commercial Code, Chapter 9, and particularly Section 9.204. On each of the same 21 instants in time, the tax liens also attached to the accounts. The tax liens could not attach sooner, because sooner, the taxpayer had no property or rights of property in the accounts to which the tax liens might attach. As with security interests in after-acquired property under the Uniform Commercial Code, so is it that the federal tax lien will attach to after-acquired property of a taxpayer, without the need for further

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assessment, levies, giving of notice, or other action. But nothing, except the opinion in the Court of Appeals in this case, enlarges the rule by which a tax lien attaches to after-acquired property to make it into a rule of priority. Likewise, nothing, except the decision in this case, creates some fictitious "relation back" rule, so as to allow the claim that a tax lien attaches to a property right of a taxpayer months and years, before the property or property right came into existence, or was that of a taxpayer.

The choate rules are, of course, court made rules. The only court decision, however, which would require that the choate tests be met months before the taxpayer had any interest in the property in question, is the decision in this case. Under the *New Britain* decision, the critical time or times were those times when the various interests attached to the property in question, rather than some earlier date when tax lien notices were filed. Notices of tax lien and the times of giving of the same are only important in the process of deciding whether the non-federal interest is entitled to a priority or superpriority over the tax lien under Section 6323. Notice is of no consequence whatsoever, if Section 6323 does not apply.

That, in after-acquired property situations particularly, two or more liens may attach to a given property simultaneously and thereby be of equal rank, is a common occurrence. The manner and principle of handling concurrent liens on a proration basis, as urged by Petitioner from the beginning of this case, is in accordance with the materials set forth in 51 Am. Jur. 2d,

Liens, Section 53 CJS, Liens, Section 10; 37 Corpus Juris, Liens, Section 40; Annotation "Priority as Between Judgments of Different Dates as Regards Liens on Subsequently Acquired Property". 67 ALR 1301.

Despite the *New Britain* holding, the paramount federal tax line right idea continues to persist to some extent. The Government continues to press it, and with some success, as in a Union County, New Jersey, trial court in *Continental Finance Company, Inc. vs. Cambridge Metal Co., Inc.*, 100 N.J. Super. 327, 241 A. 2d 353 (1968), and before a New Jersey probate judge in *Rosenberg's Will*, 62 Misc. 2d 12, 308 NYS 2d 51 (Sup. Ct., 1970). Now with so high a tribunal as the Fifth Circuit Court of Appeals giving force and effect to the idea, something must give way, either the *New Britain* rule, or the paramount federal tax lien theory. They cannot stand together.

At the outset of the opinion of the Court of Appeals, Judge Goldberg wrote of entry "with some trepidation the tortured meanderings of federal tax lien law." During the past twenty years, a great deal has gone into working out and removing, the "tortured meanderings", so that conflict, ambiguity and indecision in federal tax lien law recently has been no greater than in other settled phases of property law. Now, however, a new meander presents itself for correction before the erosion becomes great.

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CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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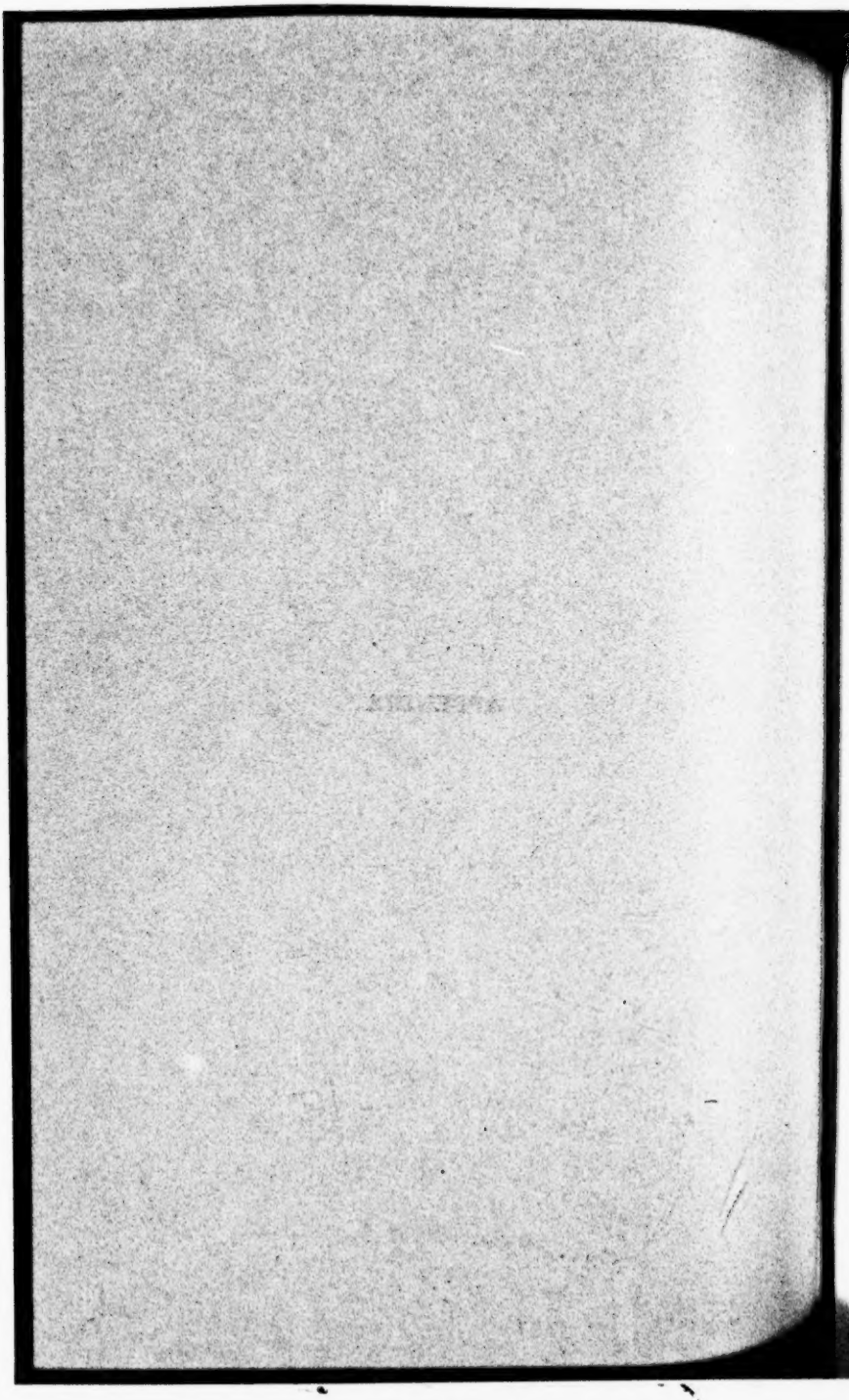
APPENDIX



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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1117

TEXAS OIL & GAS CORPORATION,
Plaintiff,

versus

THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees,

THE PECOS COUNTY STATE BANK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(September 7, 1972)

Before BELL, GOLDBERG, and RONEY, Circuit Judges.

GOLDBERG, Circuit Judge: We enter with some trepidation the tortured meanderings of federal tax lien law, intersected now by the somewhat smoother by-way of the Uniform Commercial Code. Standing at this vantage-point in the instant case, we must decide

the disposition of a fund of the taxpayer-debtor's accounts receivable that is claimed both by the Government under its tax lien authority and by the lender under the aegis of the Uniform Commercial Code. Amendments to the tax lien statutes in 1966 give us some shelter in our decision; under this lien-to we conclude that the tax lien must take priority over the claim of the private lien holder, and we affirm the judgment of the lower court.

The real parties in interest in this appeal are the Pecos Bank and the Internal Revenue Service. The nominal appellant Texas Oil & Gas Corporation, is merely the stakeholder in an interpleader action to determine the allocation of competing claims against $14,690.10, which Texas Oil & Gas admittedly owes for services rendered by the taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil & Gas Field Services. Internal Revenue's claim to the fund is based upon federal tax liens duly filed against the taxpayer in Pecos County, Texas, on February 27, 1970, for almost $55,000 in unpaid withholding and FICA taxes assessed in 1969. *See* 26 U.S.C.A. §§ 6321, 6323(f).[1]

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[1] "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."
26 U.S.C.A. § 6321.
"Place for filing notice; form. —
(1) Place for filing. — The notice referred to in subsection (a) shall be filed —

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(A) Under State laws. —

(i) Real property. — In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property. — In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental sub-division), as designated by the laws of such State, in which the property subject to the lien is situated; or

(B) With clerk of district court. — In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia. — In the office of the Recorder of Deeds of the District of Columbia if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien. — For purposes of paragraph (1), property shall be deemed to be situated —

(A) Real property. — In the case of real property, at its physical location; or

(B) Personal property. — In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2) (B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form. — The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary or his delegate. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien."

26 U.S.C.A. § 6323(f).

Pecos Bank claims an interest in the fund by virtue of a security agreement between the bank and taxpayer-debtor executed on March 25, 1967, and duly filed and perfected on March 29, 1967. *See* Tex. Bus. & Comm. Code Ann. §§ 9.401 - 9.408. Pursuant to that security agreement the bank agreed to advance money at various times to the taxpayer-debtor in exchange for a security interest in taxpayer-debtor's accounts receivable.[2] As is frequently the case in so-called "open" agreements, the amount of money to be loaned and the times at which the money was to be advanced were not specified in the contract. *See* 26 U.S.C.A. § 6323(c)(4), relating to obligatory disbursement agreements. Under the contract the lender's eventual acquisition of the accounts receivable was uncertain, contingent upon the performance of services by the taxpayer-debtor. The bank's security interest, however, attached automatically to any new accounts receivable without additional filing or perfection required by the bank. Tex. Bus. & Comm. Code Ann. § 9.204.[3] Taxpayer

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[2]The agreement between taxpayer-debtor and the bank provides for a continuing security interest in "[a]ll accounts, contract rights, chattel paper, instruments, general intangibles and rights to payment of every kind now or at any time hereafter arising out of the business of the debtor; all interest of the debtor in any goods, the sale or lease of which shall have given or shall give rise to any of the foregoing."

[3] "(a) A security interest cannot attach until there is agreement (Subdivision (3) of Section 1.201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(b) For the purposes of this section the debtor has no rights

(1) in crops until they are planted or otherwise

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agreed to factor his accounts receivable with the bank as soon as the accounts receivable arose in consideration for the the loans. The bank continued to make loans and to factor taxpayer's accounts receivable under the agreement until October 15, 1970. Taxpayer-debtor completed his services to the plaintiff, Texas Oil & Gas, during the months of September, October, and November of 1970, apparently pursuant to a contract entered into in September.

During December of 1969 and January of 1970, the Government assessed federal withholding and FICA liabilities against Blackie's for the preceding tax year, 1969. A tax lien notice was duly filed on February 27, 1970, and the United States attempted to enforce part of its lien by serving notice of levy on Texas Oil & Gas. The bank first became aware of the tax lien on October 22, 1970, and shortly thereafter served notice on Texas Oil & Gas that it too claimed Blackie's accounts receivable. This interpleader action by Texas Oil & Gas followed. F.R.Civ.Pro. 22.

Tax liens have had a mixed history in the law. *See generally* Coogan, "The Effect of the Federal Tax

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become growing crops, in the young of livestock until they are conceived;

(2) in fish until caught, in oil, gas or minerals until they are extracted, in timber until it is cut;

(3) in a contract right until the contract has been made;

(4) in an account until it comes into existence.

* * * *"

Tex. Bus. & Comm. Code Ann. § 9.204.

Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code," 81 *Harv.L.Rev.* 1369 (1968); *United States v. Vermont*, 2 Cir. 1963, 317 F.2d 446 (Friendly, J.), *aff'd*, 1964, 377 U.S. 351, 84 S.Ct. 1267, 12 L.Ed.2d 370. For the past two decades, however, the federal tax lien has held the upper hand in its battles with competing private liens. The genesis of that advantage, as it applies to the instant case, appears to be *United States v. Security Trust & Savings Bank*, 1950, 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53. Prior to *Security Trust*, the courts had carved out a doctrine concerning the priority granted to a federal tax lien in competition with a private lien in situations in which the taxpayer-debtor was insolvent. 31 U.S.C.A. § 191.[4] Under the tax lien law as it developed for insolvent taxpayer-debtors, a private lien competing with a federal tax lien had to be "choate" and perfected. *See Spokane County v. United States*, 1929, 279 U.S. 80, 49 S.Ct. 321, 73 L.Ed. 621; *see generally* Kennedy, "The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien," 63 *Yale L.J.* 905 (1954); Kennedy, "From Spokane to Vermont: The Campaign of the Federal Government Against the Inchoate Lien," 50 *Iowa L.Rev.* 724 (1965). Choateness, a concept entirely court-made, *see* Plumb, "Federal Liens and Priorities-Agenda for the Next Decade," 77 *Yale L.J.* 228, 230 (1967), requires that the private lien holder establish the identity of the lienor, the property subject to the lien, and the fixed amount of the lien. *See, e.g., United States v. New Britain*, 1953, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520; *United States v. Pioneer American Insurance Co.*, 1963,

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[4]This statute is generally known as R.S. 3466 even though it is part of the Code.

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374 U.S. 84, 83 S.Ct. 1651, 10 L.Ed.2d 770. The Choateness requirement has generally been harsh in insolvency situations. *See, e.g., United States v. Gilbert Associations, Inc.*, 1953, 345 U.S. 361, 73 S.Ct. 701, 97 L.Ed. 1071, where the Supreme Court indicated that only possession or reduction to judgment would allow a private lien to prevail over a competing federal tax lien. But *United States v. Security Trust, supra*, marked the first time in which the Supreme Court applied the choateness doctrine to a competing lien situation in which the debtor was not insolvent. And in *United States v. R. F. Ball Construction Co.*, 1958, 355 U.S. 587, 78 S.Ct. 442, 2 L.Ed.2d 510, the Supreme Court applied its choateness doctrine to a situation in which the private lien, an assignment of sums due for performance of a subcontract which was competing with a federal tax lien, had been created entirely by contract between private parties. *See especially United States v. Ball, supra* (Whittaker, J., dissenting), and *United States v. Pioneer American Insurance Co.*, 1963, 374 U.S. 84, 83 S.Ct. 1651, 10 L.Ed.2d 770, for an explanation of the rather abbreviated opinion of the majority in *United States v. Ball, supra*.[5] Prior to *Ball* the choateness doctrine had been applied only to statutory liens or to liens created by attachment or garnishment. At the same time that the Supreme Court was extending the perimeters of the types of private liens that were subject to the choateness doctrine, it also gave some

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[5] "The Court has never held that mortgagees [under section 6323(a)] face a less demanding test of perfection than other interests when competing with a federal lien. Indeed United States v. R. F. Ball Constr. Co. . . . stands for just the contrary."
United States v. Pioneer American Insurance Co., 374 U.S. at 89, 10 L.Ed.2d at 775.

indication that the doctrine would not operate as severely when applied to the private liens newly-added to the choateness test as it had when applied to federal priority under the insolvency statute. *See United States v. New Britain, supra;* Coogan, 81 *Harv. L. Rev.* at 1378-1379. Even for that proposition, however, there is some conflicting authority from the Supreme Court. In *United States v. White Bear Brewing Co.*, 1956, 350 U.S. 1010, 76 S.Ct. 646, 100 L.Ed. 871, a majority of the Supreme Court reversed a lower court conclusion that a federal tax lien did not have priority over a statutory mechanics' lien ". . . even though the mechanics' lien was specific, prior in time, perfected in the sense that everything possible under state had been done to make it choate, and was being enforced before the federal tax lien arose." *United States v. White Bear Brewing*, 350 U.S. at 1010, 100 L.Ed. at 871 (Douglas, J., dissenting).[6] Two later opinions appear to reaffirm the intimation in *United States v. Ball, supra*, that the choateness tests were not so severe for liens arising under section 6321 as they were for liens arising under R. S. 3466. *See Crest Finance Co. v. United States*, 1961, 368 U.S. 347, 82 S.Ct. 384, 7 L.Ed.2d 342, and *United States v. Vermont*, 1964, 377 U.S. 351, 84 S.Ct. 1267, 12 L.Ed.2d 370.

Against this historical background Congress in 1966 amended the tax lien provisions of section 6323 in a number of ways. The amendments are

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[6] As with United States v. Ball, *supra*, it is the dissenting opinion that brings out the facts more clearly. The majority opinion in United States v. White Bear Brewing, *supra*, is simply a per curiam reversal. *See also* United States v. White Bear Brewing Co., 7 Cir. 1954, 227 F.2d 359.

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". . . in part an attempt to conform the lien provisions of the internal revenue laws to the concepts developed in this Uniform Commercial Code. It represents an effort to adjust the provisions in the internal revenue laws relating to the collection of taxes of delinquent persons to the more recent developments in commercial practice (permitted and protected under state law) and to deal with a multitude of technical problems which have arisen over the past 50 years."

S. Rep. No. 1708, 89th Cong., 2d Sess. (1966); *see also* H. R. Rep. No. 1884, 89th Cong., 2d Sess. (1966). We must construe but a small part of these amendments for purposes of this appeal, primarily the amendments to section 6323(c).[7]

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[7] "(c) Protection for certain commercial transactions financing agreements, etc. —

(1) In general. — To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which —

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting —

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) Commercial transactions financing agreement. — For purposes of this subsection —

(A) Definition. — The term "commercial transactions financing agreement" means an

The parties have submitted their own theories of this case, and we find ourselves in the not too unusual position of rejecting large parts of both theories. It is the Government's general position, as we understand it, that the usual tests of choateness in non-insolvency situations would operate to give priority to the tax lien. The bank attempts to turn elements of the choateness doctrine back on the Government. It argues that

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agreement (entered into by a person in the course of his trade or business) —

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on qualified property. — The term "qualified property", when used with respect to a commercial transactions financing agreement includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial financing security defined. — The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser treated as acquiring security interest. — A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

* * * "

26 U.S.C.A. § 6323(c).

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taxpayer-debtor's accounts receivable became subject to the liens of the bank and of the Government at the same time. In effect, the bank concedes that it does not come within the protective perimeters of section 6323(c), but it contends that it should divide the accounts receivable with the Government upon a mathematical formula consonant with its own theory of simultaneous attachment.

The tax lien statute itself narrows the issue in this appeal considerably. Section 6323(c), truncated somewhat, provides that a section 6321 lien ". . . shall not be valid with respect to a security interest which came into existence after tax lien filing but which . . . is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting . . . a commercial transactions financing agreement . . . and . . . is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation." "Security interest" is defined generally for section 6323 by section 6323(h)(1):

> "Definitions. — For purposes of this section and section 6324—
>
> (1) Security interest. — The term 'security interest' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law

against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth."

However, section 6323(c)(1) appears to have qualified that general definition. Unlike the "security interest" contemplated by section 6323(h)(1)(A), a section 6323 (c) interest need not always be "in existence" at the standard point-in-time reference to "existence" of section 6323(h)(1)(A), for section 6323(c) by its terms contemplates certain limited types of property acquired after the point-in-time reference, which is "as of the time of tax lien filing" for purposes of section 6323(c)(1)(B). A security interest cannot be "perfected" until it "attaches," Tex. Bus. & Comm. Code Ann. § 9.303, and the interest cannot attach prior to the time that the "debtor has rights in the collateral," Tex. Bus. & Comm. Code Ann. § 9.204(a). By definition, the debtor in section 6323(c) situations often does not attain "rights in the collateral" until after the tax lien filing, and it is to that problem that section 6323(c) directs its attention. *See* Young, "Priority of the Federal Tax Lien," 34 *U.Chi.L.Rev.* 723 (1967); Coogan, 81 *Harv. L.Rev.* at 1397, 1404-1405; *but cf. United States v. Strollo*, 67-1 U.S. Tax. Cas. 83,162 (Fla. Dist. Ct. App. 1966), where it appears that a security interest in the after-acquired property in question (contract rights) did not attach immediately under the existing (pre-Uniform Commercial Code) Florida law. In addition, to qualify as a "security interest" under section 6323(h)(1)(A) and section 6323(c)(1)(B), the security interest must be "protected under local law against a subsequent judgment lien arising out of an unsecured obli-

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gation." The phrase "protected against a judgment lien" is not a term of art easily adaptable to the sometimes equally unartful language of the Uniform Commercial Code. *See Hearings before the House Ways and Means Comm. on H.R. 11256 and H.R. 11290,* 89th Cong., 2d Sess. (1966), for a suggested alternative to the present "judgment lien" test; *cf.* Mellinkoff, "The Language of the Uniform Commercial Code," 77 *Yale L.J.* 185 (1967). In the context of section 6323(c), however, "protected against a judgment lien" does not raise the problems that might occur in other sections of the tax lien amendments. *See, e.g.,* 26 U.S.C.A. § 6323(d); Coogan, 81 *Harv.L.Rev.* 1369, *supra;* Plumb, 77 *Yale L.J.* 228, *supra.* A security interest in after-acquired accounts receivable "is perfected when it has attached," Tex.Bus. & Comm. Code Ann. § 9.303, and the interest attaches automatically if the lender has taken "all of the applicable steps required for perfection" under Tex. Bus. & Comm. Code Ann. §§ 9.302-9.306. At the same time, a perfected security interest "is protected by local law" against a person who does not become "a lien creditor . . . before it [the security interest] is perfected," Tex. Bus. & Comm. Code Ann. § 9.301(a)(2).[8] Because a judgment creditor, like a

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[8]A so-called judgment lien is not a term specifically contemplated by the Uniform Commercial Code, *see* Tex. Bus. & Comm. Code Ann. § 9.104(8). But the judgment lien, as a standard against which a security interest competing with a federal tax lien is measured by section 6323. is properly analogous to a "lien creditor" if the judgment holder has actually acquired a lien under applicable state law:

> "A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like. . . ."

Tex. Bus. Comm. Code Ann. § 9.301(c).

secured creditor, cannot attach his lien to the debtor's after-acquired accounts receivable until the accounts receivable come into existence regardless of whether he has taken all the necessary actions for perfection under state law, the judgment lien could not possibly become perfected *before* the security holder's interest becomes perfected. At the most, the judgment lien could become perfected at the same time that the security interest becomes perfected, but that circumstance does not alter the security holder's priority under the Uniform Commercial Code.[9]

The agreement in question in the instant case was also a "commercial transactions financing agreement" contemplated by section 6323(c)(2)(A)(i) of the 1966 amendments:

> "[A]n agreement (entered into by a person in the course of his trade or business) —
>
> (i) to make loans to taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business. . ."

However, the protection given to a private lien in competition with a Government tax lien for after-ac-

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[9]Under Texas law it is possible that a judgment lien could attach automatically upon entry of judgment to property existing prior to the date of judgment on which a writ of attachment had been levied. *See* Tex.Stat. Ann. Art. 300; Midway National Bank of Grand Prairie v. West Texas Wholesale Co., 447 S.W. 2d 709 (Tex.Civ.App. 1969). The writ of attachment, however, cannot be levied upon after-acquired property. *See* Tex. Stat Ann. Art. 288; Smith & Co. v. Whitfield, 2 S.W. 822 (Tex.Civ. App. 1887); Shaw v. Frank, 334 S.W.2d 476 (Tex.Civ.App. 1959). *See also* Miss. Code Ann. § 1555.

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quired property secured pursuant to a non-obligatory disbursement agreement is a limited protection. Congress was understandably unwilling, as a general proposition, to allow a taxpayer-debtor to lock in his property for an indefinite period of time pursuant to a security agreement for advances that he could draw upon at will. Section 6323(c), as amended, represents the limited exceptions to that general proposition in the context of the courts' choateness doctrines:

> "[S]uch an agreement shall be treated as coming within the term [commercial transactions financing agreement] only to the extent that such loan or purchase is made before the 46th day after the date of the tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing."

26 U.S.C.A. § 6323(c)(2); *see* section 6323(c)(4) with regard to funds advanced and property secured pursuant to obligatory disbursement agreements. Based on the above language alone, there is a position intermediate between that argued by the bank and that advanced by the Government, namely, that the bank would maintain a priority over the Government tax lien for property acquired after the filing of the tax lien but acquired pursuant to loans actually advanced prior to or within 45 days after the filing of the tax lien. For funds advanced after the 45 day period, the Government would take priority. Such a reading of section 6323(c)(4) would allow a commercial lender to claim only collateral for which it actually disbursed funds

within the 45 day time period after the filing of the tax lien, thus preventing a security agreement on after-acquired property that might allow the commercial lender to take an infinite security interest in after-acquired property by contracting for a large paper loan and for protracted actual advancing of the loan funds. The history of the statute however, will not support that reading.

It appears clear that Congress contemplated not only that the funds must actually be advanced prior to or within 45 days of the filing of the tax lien, but also that the secured property must be "acquired" within that period:

> "The term 'qualified property' when used with respect to a commercial transactions financing agreement, includes only commercial financing security *acquired* by the taxpayer before the 46th day after the date of tax lien filing."

26 U.S.C.A. § 6323(c)(2)(B) [emphasis added]. The Senate Finance Committee in reporting the 1966 amendments concluded that ". . . protection is afforded only where the loan or purchase is made not later than 45 days after the tax lien filing . . . and only where the . . . accounts receivable . . . are *acquired* before the 45 days have elapsed." S.Rep. No. 1708 *supra*, [emphasis added]. Although it is not clear from the record whether the bank in the instant case had actually advanced funds to the taxpayer-debtor within the 45 day "grace" period, it is undisputed that none of the ac-

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counts receivable came into existence prior to April 13, 1970, 45 days after the filing of the tax lien.

Arguably, the bank could claim that its security interest was "acquired" when the loan agreement was reached. *See* 2 G. Gilmore, *Security Interests in Personal Property* § 45.5 (1965). In order to maintain that argument, however, the lender would have to contend that at the time of the tax lien filing "the debtor [had] rights in the collateral" in the present, even though the security itself might exist only in the future. Tex. Bus. & Comm. Code Ann. § 9.204(a). This problem, of course, ultimately relates to the choateness doctrine as it applies to the instant case.

The Supreme Court has maintained the integrity of the choateness doctrine, such as it is, throughout a number of amendments to the tax lien statutes:

> "The predecessor to § 6323 was first enacted by Congress in 1912 in order to protect mortgagees, purchasers and judgment creditors against a secret lien for assessed taxes and to postpone the effectivenes of the tax lien as against these interests until the tax lien was filed. HR Rep. No. 1018, 62nd Cong., 2d Sess. [An amendment prompted, it appears, by the Supreme Court's decision in *United States v. Snyder*, 1892, 149 U.S. 210, 13 S.Ct. 846, 37 L.Ed. 705]. The section dealt with the federal lien only and it did not purport to affect the time at which local liens were deemed to arise or to become choate or to subordinate the tax lien

> to tentative, conditional or imperfect state liens. Rather, we believe Congress intended that if out of the whole spectrum of state-created liens, certain liens are to enjoy the preferred status granted by § 6323, they should at least have attained the degree of perfection required of other liens *and be choate for the purpose of the federal rule.*"

United States v. Pioneer American Insurance Co., 1963, 374 U.S. 84, 89, 83 S.Ct. 1651, ——, 10 L.Ed.2d 770, 775 [emphasis added]. It is settled law that the ". . . effect of a [state-created] lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question," whether or not the state law would classify the private lien as specific and perfected. *United States v. Security Trust*, 340 U.S. at 49, 95 L.Ed. at 56.

> "Otherwise a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined."

United States v. New Britain, 347 U.S. at 86, 98 L.Ed. at 526. *See also United States v. Acri*, 1954, 348 U.S. 211, 75 S.Ct. 239, 99 L.Ed. 264; *United States v. Waddill, Holland & Flinn*, 1945, 323 U.S. 353, 65 S.Ct. 304, 89 L.Ed. 294. Thus, although a state's conclusion that a particular lien is specific and perfected ". . . is entitled to

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weight, it is subject to re-examination by this [federal] Court." *United States v. Security Trust*, 340 U.S. at 49-50, 95 L.Ed. at 56. However, if state law itself would determine that a particular lien was not "acquired" or choate, in the federal sense of the terms, that determination would be "practically conclusive." *Illinois ex rel. Gordon v. Campbell*, 1946, 329 U.S. 362, 371, 67 S.Ct. 340, ____, 91 L.Ed. 348, 355. The Texas version of the Uniform Commercial Code provides that ". . . the debtor has no rights . . . in an account until it comes into existence." Tex. Bus. & Comm. Code Ann. § 9.204(b)(4). The Uniform Commercial Code uses only the word "account," which is defined as ". . . any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper." Tex. Bus. & Comm. Code Ann. § 9.106. Although "account" may be somewhat narrower than "account receivable," *See* Coogan, 81 *Harv. L. Rev.* at 1407, the difference between the two commercial terms is not substantive for purposes of the instant case. *See also* Tex. Bus. & Comm. Code Ann. § 9.103, comment 2, which appears to interchange the terms "account" and "account receivable" as their transactional genesis is contemplated by the section. Both terms contemplate ". . . rights . . . for services rendered . . ." by the debtor that create a debt owing to the debtor by another party. *See* Tex. Bus. & Comm. Code Ann. § 106, comment; *Chester v. Jones*, 386 S.W.2d 544 (Tex.Civ.App. 1965); Melinkoff, 77 *Yale L.J.* at 198-199. Thus, it is unlikely under Texas law that the money owed to taxpayer-debtor by Texas Oil & Gas could be considered "acquired" accounts or accounts receivable at the time of the filing of the tax lien or 45 days later on April 13,

1970, for prior to that date taxpayer-debtor had neither entered into a contract with Texas Oil & Gas nor rendered services. Even if the payment owing to taxpayer-debtor from Texas Oil & Gas could be considered "acquired" accounts receivable under Texas law by April 13, 1970, it also appears that state law would conclude that the bank's security interest could not finally attach until the accounts receivable came into existence, that is, until the services were rendered and the debt became owing. In addition, the performance by the taxpayer-debtor that underlies the accounts receivable in issue could not be considered a "contract right" at the time the tax lien was filed, for there was no contract between taxpayer-debtor and Texas Oil & Gas in existence at that time. *See* Tex. Bus. & Comm. Code Ann. §§ 9.106, 9.204(a); *see also*, Plumb, 77 *Yale L.J.* at 666; Young, "Priority of the Federal Tax Lien", *U.Chi.L.Rev.* 723, 743-748 (1967).

The most substantial present interest that the bank could claim in the accounts receivable at the time of the tax lien filing or within 45 days thereafter was that of a "general intangible." *See* Tex. Bus. & Comm. Code Ann. § 9.106. But the legislative history of the 1966 amendments to the tax lien statutes expressly excludes "general intangibles" from classification as "qualified property" of commercial financing security. H.R. Rep. No. 1884, 89th Cong., 2d Sess. 42 (1966); 26 U.S.C.A. § 6323(c)(2)(B).

Thus it appears that even state law would not render the bank's security interest in taxpayer-debtor's accounts receivable sufficient to pass muster under the

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federal standards of choateness. The accounts receivable were simply not "acquired" at the required point in time, in this case within 45 days of the filing of the tax lien. This is not to imply in any way that the bank's security interest in the accounts receivable was not sufficiently perfected under state law. As we have pointed out earlier, it appears clear that no other action was required to maintain the bank's security interest in the future accounts receivable of taxpayer-debtor, Tex. Bus. & Comm. Code Ann. § 9.204(a), save that the accounts had to come into existence.

Regardless of state law, it appears even clearer that federal law would not consider the bank's interest sufficiently choate to defeat the federal tax lien. In two cases that followed *United States v. Security Trust, supra*, the Supreme Court indicated a continued unwillingness to protect a private lien holder for non-obligatory agreements entered into prior to the filing of a tax lien but becoming fixed after the filing. *United States v. Pioneer American Insurance Co.*, 1963, 374 U.S. 84, 83 S.Ct. 1651, 10 L.Ed.2d 770; *United States v. Equitable Life Assurance Society*, 1966, 384 U.S. 323, 86 S.Ct. 1561, 16 L.Ed.2d 593. Both cases involved the priority to be attached to attorneys' fees that accrued pursuant to mortgages that were admittedly superior to the federal tax lien. In *Pioneer American*, state law provided that the attorneys' fees became enforceable as an indemnity contract immediately upon default of the mortgage, and the default and the suit to foreclose the mortgage both occurred prior to the filing of the tax lien. Nevertheless, the Supreme Court held that the attorneys' lien was inchoate because it had not been

reduced to a fixed amount at the time the tax lien was filed (pre-1966 amendments). In *Equitable Life* the attorneys' fees awarded pursuant to a foreclosure of the superior private mortgage, were based under state law upon a fixed percentage of the mortgage, which was a known sum. The Supreme Court nonetheless concluded that Equitable's lien was inchoate, reasoning that there was no presently existing lien for attorneys' fees when the tax lien was filed because the mortgage had not been in default at the filing date. In both *Equitable Life* and *Pioneer American* the fact that the final transaction on which the private lien was allegedly based was not yet in existence at the time of the tax lien filing played an important role in the Court's reasoning. In the instant case, it is true that the bank had done all it could do under the Uniform Commercial Code to secure its interest in taxpayer-debtor's accounts receivable. However, that conclusion simply does not answer the case law as it has developed in the area of tax liens. However "complete" a lender's perfection may be under state recording laws and however "specific" state law might deem that interest to be, it is federal law that determines the extent to which that state determination will protect a private lien from a federal tax lien. It appears clear from the case law that an account receivable not yet "acquired" at the time of the filing of a tax lien because the final transaction creating the account receivable was not yet in existence cannot be considered choate, save for those accounts receivable now protected by section 6323(c). The Senate Finance Committee, speaking generally of the 1966 amendments, concluded that:

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> ". . . [i]n the case of commercial transactions financing, the protection generally is afforded even though the property underlying the lien is not yet in existence or is turned over within a short time (45 days) after the tax lien filing as long as the loan . . . is made within this time."

S. Rep. No. 1708. Thus, it appears that Congress separated the transactions of lending and "acquiring" the secured collateral, requiring that both transactions be completed within 45 days of the filing of a tax lien. Since the accounts receivable were not "acquired" for purposes of the federal tax lien statutes until the work was performed for Texas Oil & Gas, the bank in the instant case simply does not come within the judicial or statutory protection afforded to private lien holders in competition with federal tax liens.

Having lost on the 1966 amendments and on choateness, the bank's next argument is at least ingenious — if you cannot get a whole loaf under the applicable law, try for half-a-loaf by arguing the applicability of different law. The bank argues that the tax lien attaches only when its own lien attaches, that is, when the accounts receivable come into existence. From that premise the bank asserts that because it seeks only parity with the Government lien and not priority, it does not come within the scope of the tax lien amendments or the choateness doctrine at all. Neither the history of tax liens nor the language and history of the 1966 amendments to the tax lien statutes support that view. *See* Plumb, 77 *Yale L.J.* at 232, 648; Coogan, 81 *Harv.L.Rev.* 1373, supra. Section 6323 certainly was not

enacted to decide dead heats among racing lien holders. If Congress intended to deal with liens on a basis of equality with the Government rather than priority, its legislative competence could have comprehended such a condition. The 1966 amendments provide for sudden death (inferiority) when neither the loan nor the security has federal existentiality prior to 45 days from the filing of the tax lien. Congress could not have intended that a piece of lien paper alone could always have parity with a Government lien. We further conclude that these amendments amount to a reasonably comprehensive statement of the lien position of the Government *in competition with* liens held or asserted to be held by private individuals, save principally for liens contemplated under the so-called purchase money doctrine. *See* H.R. Rep. No. 1884, 89th Cong., 2d Sess. (1966). At no point in the history of tax lien litigation and legislation, at least after *United States v. Security Trust, supra*, have we been able to discern a strain of the "parity" argument that the bank now advances, although occasions have arisen in which the argument might have been applied. If appellant's theory is accepted, lien documents of ancient lineage without any actual debtor relationship or physical security would be subject to rejuvenation at any time and for all time. We think that *United States v. New Britain, supra*, and section 6323(c) gave added potency to private liens competing with section 6321 liens, but did not make them invincible or half-invincible for all times and under all conditions. As the Supreme Court made clear in the case the bank urges so strongly:

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> "[T]he priority of each statutory lien . . . must depend on the time it attached to the property in question *and became choate.*"

United States v. New Britain, 347 U.S. at 86, 98 L.Ed. at 526 [emphasis added]. For the private lien holder, the security interest must both attach and be perfected under state law and be choate under federal law. The Government's tax lien attaches immediately upon assessment. 26 U.S.C.A. § 6322.[10] And a federal tax lien, duly filed, becomes enforceable immediately against all after-acquired property. *See* 26 U.S.C.A. § 6321, *supra* note 1. *United States v. Pioneer American, supra; United States v. New Britain, supra; United States v. Security Trust, supra; see also* Coogan, Hogan, Vagts, *Secured Transactions under the U.S.C.* § 12.03(1). It would be technically incorrect to describe the Government's enforceability as "choateness" under the traditional doctrine, but the immediate enforceability of a tax lien upon assessment and filing, 26 U.S.C.A. §§ 6322, 6323(f), serves the same function. Like the state-created lien, a federal tax lien attaches immediately to after-acquired property without any further action required by the Government. *See, e.g., United States v. New Britain, supra.* And, like the state-created lien, a federal tax lien would be subject to execution only

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[10] "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time."
26 U.S.C.A. § 6322.

when the collateral came into existence, for only then would there be something on which to levy. Thus, even though the bank is correct in arguing that the Government, like the bank, cannot claim an immediately enforceable interest in non-existing property but can only wait until the accounts receivable come into existence before attempting to levy on its tax lien, the bank's argument stops short of dealing with the choateness problems inherent in a competing lien situation between tax lien and private lien. It does not appear to this court that the 1966 amendments to the tax lien statutes did away with the choateness doctrine of *United States v. Security Trust, supra.* The Supreme Court expressly rejected that inference after earlier amendments to the tax lien statutes. *See United States v. Pioneer American, supra.* Moreover, the bank is in a peculiar position to argue that the Uniform Commercial Code has had such an effect upon the prior doctrine. Not only is state law generally only referentially relevant to the *extent* of protection to be afforded to private liens in competition with tax liens, but also the bank has attempted to place itself entirely without the 1966 amendments that purport to mesh the tax lien statutes and the Uniform Commercial Code. The bank's assertion of "parity" with the Government lien simply ignores the historical travels and travails of tax liens.

In short, the Government held an enforceable lien upon the taxpayer-debtor's accounts receivable on April 13, 1970, 45 days after the tax lien was filed. For purposes of this appeal, that is the date on which a still picture was taken of the bank's interest in taxpayer-debtor's accounts receivable. *See United States v.*

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Equitable Life, supra; United States v. Pioneer American, supra. And on that date the bank held a potential security interest in accounts receivable, which might or might not arise. The fact that the bank had done all that it could do under state law to protect its interest and the fact that the bank's lien would attach immediately upon receipt by the taxpayer-debtor of any after-acquired accounts receivable is only marginally relevant to disposition of the accounts receivable when the bank's lien is in competition with a federal tax lien. Because this potential interest in future accounts receivable cannot pass muster under the traditional choateness doctrine and because the 1966 amendments to the tax lien statute do not appear to expand that choateness doctrine in any manner other than to extend the required time of receipt for 45 days past the filing of the tax lien, the bank lien is inferior to the federal tax lien. The accounts receivable of the taxpayer-debtor were not "acquired," which is to say, "in existence or . . . turned over" prior to or within 45 days of the filing of the tax lien, S.Rep. No. 1708, *supra;* and, as we read the statutes and the cases, that ends the matter.

Of course we realize that this disposition does not afford the protection that commercial lenders who deal with after-acquired property might prefer. As the law appears to stand, the commercial lender must check the applicable records every 45 days or else seriously jeopardize his security under the varying degrees of rigor promulgated by the choateness doctrine. Even that 45 day grace period is probably of minimal effica-

cy. Commercial lenders might often be lulled into a false sense of security with debtors who are doing badly, for it might appear to the lender that such a debtor is unlikely to have any income to tax. Yet it is precisely in these circumstances that back taxes are likely to accrue. In addition, the lender would most likely not have the entire 45 day period in which to act unless he were lucky enough to discover the tax lien filing almost immediately after it was filed. Finally, there is often not a great deal that the lender can do to protect his advances even after he discovers the tax lien in time. Of course, he has little control over the actual receipt of after-acquired property by the taxpayer-debtor, which is usually subject to contracts and contingencies entirely within the authority of the taxpayer-debtor and various third-parties. The lender can attempt to substitute other existing collateral for his interest in after-acquired property if the taxpayer-debtor has any substitutable assets and if there is sufficient time."[11] Of course, however difficult the present amendments to the tax lien statutes might be to commercial lenders, the amendments offer greater protection to certain categories of lien holders and liens than were afforded by prior doctrines. But the whole genesis and historicity of section 6323(c) appears to have been to give only a slight handicap (45 days) to a private lien holder. The bank here did not establish its case under the

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[11]The American Bar Association proposed in 1959 that the lender should be protected against a tax lien to the extent of the value of the taxpayer-debtor's security as of the time of the tax lien filing. Thus, the A.B.A. proposal would have allowed infinite substitutions of collateral after a tax lien filing in order to maintain the value of the security to that date. 84 A.B.A. Rep. 685 (1959).

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choateness doctrine or under these statutory amendments, and the judgment of the district court awarding the accounts receivable fund to the Government by virtue of its tax lien is affirmed.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 72-1117

D. C. Docket No. 70-CA-48

TEXAS OIL & GAS CORPORATION,
Plaintiff,

versus

THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees,

THE PECOS COUNTY STATE BANK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

Before BELL, GOLDBERG and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: September 7, 1972

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APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1117

TEXAS OIL & GAS CORPORATION,
Plaintiff,

versus

THE UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees,

THE PECOS COUNTY STATE BANK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Sept. 7, 1972, 5 Cir., 1972, ____ F.2d ____).

(October 31, 1972)

Before BELL, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "D"

STATUTES

1. Section 6321 of the Internal Revenue Code of 1954 (26 United States Code, Section 6321)

§ 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Aug. 16, 1954, c. 736, 68A Stat. 779.

2. Section 3670 of the Internal Revenue Code of 1939

§ 3670. Property subject to lien

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If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

3. Section 6323 of the Internal Revenue Code of 1954 (26 United States Code, Section 6323) as in effect prior to the 1966 Amendments to the Section

VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

Sec. 6323 [1954 Code]. (a) *Invalidity of Lien Without Notice.* — Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate —

(1) *Under state or territorial laws.* — In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.* — In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia.* — In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of Notice.* — If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in Case of Securities.* —

(1) *Exception.* — Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid, with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such se-

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curity, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) *Definition of security.* — As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) *Exception in Case of Motor Vehicles.* —

(1) *Exception.* — Even though notice of a line provided in section 6321 has been held in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a motor vehicle, as defined in paragraph (2) of this subsection, as against any purchaser of such motor vehicle for an adequate and full consideration in money or money's worth if —

(A) at the time of the purchase the purchaser is without notice or knowledge of the existence of such lien, and

(B) before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(2) *Definition of motor vehicle.* — As used in this subsection, the term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(3) *Disclosure of Amount of Outstanding Lien.* — If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

Aug. 16, 1954, c. 736, 68A Stat. 779; Feb. 26, 1964, Pub.L. 88-272, Title II, § 236(a), (c) (1), 78 Stat. 127, 128

4. Section 3672 of the Internal Revenue Code of 1939 § 3672. Validity against mortgagees, pledgees, purchasers, and judgment creditors

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(a) *Invalidity of lien without notice.* Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector —

(1) *Under State or Territorial laws.* In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of district court.* In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With clerk of district court of the United States for the District of Columbia.* In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) (1) *Exception in case of securities.* Even though notice of a lien provided in section 3670 has been filed in the manner prescribed in subsection (a) of this section, or no-

tice of a lien provided in section 3186 of the Revised Statutes, as amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser, of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) *Definition of security.* As used in this subsection the term "security" means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(3) *Applicability of subsection.* Except where the lien has been enforced by a proceeding, suit, or civil action which has become final before the date of enactment of the Revenue Act of 1939, this subsection shall apply

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regardless of the time when the mortgage, pledge, or purchase was made or the lien arose. 53 Stat. 449, amended June 29, 1939, 10 p. m., E. S. T., c. 247, Title IV, § 401, 53 Stat. 822; Oct. 21, 1942, 4:30 p. m., E. W. T. c. 619, Title V, § 505, 56 Stat. 957.

5. Section 6323 of the Internal Revenue Code of 1954 (26 United States Code, Section 6323) as amended at this time

§ 6323. Validity and priority against certain persons

(a) *Purchases, holders of security interests, mechanic's lienors, and judgment lien creditors.* — The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate.

(b) *Protection for certain interests even though notice filed.* — Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid —

(1) *Securities.* — With respect to a security (as defined in subsection (h) (4)) —

(A) as against a purchaser of such security who at the time of purchase did not

have actual notice or knowledge of the existence of such lien; and

(B) as against a holder of a security interest in such security who, at the time such interest came into existence did not have actual notice or knowledge of the existence of such lien.

(2) *Motor vehicles.* — With respect to a motor vehicle (as defined in subsection (h) (3)), as against a purchaser of such motor vehicle, if —

(A) at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B) before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) *Personal property purchased at retail.* — With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such

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purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) *Personal property purchased in casual sale.* — With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) purchased (not for resale) in a casual sale for less than $250, as against the purchaser, but only if such purchaser does not have actual notice or knowledge (A) of the existence of such lien, or (B) that this sale is one of a series of sales.

(5) *Personal property subject to possessory lien.* — With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) *Real property tax and special assessment liens.* — With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of —

(A) a tax of general application levied by any taxing authority based upon the value of such property;

(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C) charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) *Residential property subject to a mechanic's lien for certain repairs and improvements.* — With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $1,000.

(8) *Attorneys' liens.* — With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforcible against such judgment or amount, to the extent of his reasonable compensation for obtaining such

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judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) *Certain insurance contracts.* — With respect to a life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time —

(A) before such organization had actual notice or knowledge of the existence of such lien;

(B) after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C) after satisfaction of a levy pursuant to section 6332 (b), unless and until the Secretary or his delegate delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) *Passbook loans.* — With respect to a savings deposit, share, or other account, evidenced by a passbook, with an institution described in section 581 or 591, to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account and if such institution has been continuously in possession of such passbook from the time the loan is made.

(c) *Protection for certain commercial transactions financing agreements, etc.* —

(1) *In general.* — To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which —

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting —

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

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(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) *Commercial transactions financing agreement.* — For purposes of this subsection —

(A) *Definition.* — The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business) —

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) *Limitation on qualified property.* — Tht term "qualified property", when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) *Commercial financing security defined.* — The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) *Purchaser treated as acquiring security interest.* — A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

(3) *Real property construction or improvement financing agreement.* — For purposes of this subsection —

(A) *Definition.* — The term "real property construction or improvement financing agreement" means an agreement to make cash disbursements to finance —

(i) the construction or improvement of real property,

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(ii) a contract to construcst or improve real property, or

(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) *Limitation on qualified property.* — The term "qualified property.', when used with respect to a real property construction or improvement financing agreement, includes only —

(i) in the case of subparagraph (A) (i), the real property with respect to which the construction or improvement has been or is to be made,

(ii) in the case of subparagraph (A) (ii), the proceeds of the contract described therein, and

(iii) in the case of subparagraph (A) (iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A) (iii).

(4) *Obligatory disbursement agreement.* — For purposes of this subsection —

(A) *Definition.* — The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) *Limitation on qualified property.* — The term "qualified property", when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) *Special rules for surety agreements.* — Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person —

(i) the term "qualified property" shall be treated as also including the proceeds of the contract the performance of which was ensured, and

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(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term "qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

(d) *45-day period for making disbursements.* — Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest —

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(e) *Priority of interest and expenses.* — If the lien imposed by section 6321 is not valid as

against alien or security interest, the priority of such lien or security interest shall extend to —

(1) any interest or carrying charges upon the obligation secured,

(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) tht reasonable costs of insuring payment of the obligation secured, and

(6) amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321,

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

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(f) *Place for filing notice; form.* —

(1) *Place for filing.* — The notice referred to in subsection (a) shall be filed —

(A) *Under State laws.* —

(i) *Real property.* — In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) *Personal property.* — In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; or

(B) *With clerk of district court.* — In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) *With Recorder of Deeds of the District of Columbia.* — In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) *Situs of property subject to lien.* — For purposes of paragraph (1), property shall be deemed to be situated —

(A) *Real property.* — In the case of real property, at its physical location; or

(B) *Personal property.* — In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2) (B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) *Form.* — The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary or his delegate. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(g) *Refiling of notice* — For purposes of this section —

(1) *General rule.* — Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period,

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such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) *Place for filing.* — A notice of lien refiled during the required refiling period shall be effective only —

(A) if such notice of lien is refiled in the office in which the prior notice of lien was filed; and

(B) in any case in which, 90 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary or his delegate received written information (in the manner prescribed in regulations issued by the Secretary or his delegate) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) *Required refiling period.* — In the case of any notice of lien, the term "required refiling period" means —

(A) the one-year period ending 30 days after the expiration of 6 years after the date of the assessment of the tax, and

(B) the one-year period ending with the expiration of 6 years after the close of the preceding required refiling period for such notice of lien.

(4) *Transitional rule.* — Notwithstanding paragraph (3), if the assessment of the tax was made before January 1, 1962, the first required refiling period shall be the calendar year 1967.

(h) *Definitions.* — For purposes of this section and section 6324 —

(1) *Security interest.* — The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

(2) *Mechanic's lienor.* — The term "mechanic's lienor" means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement of such property. For

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purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

(3) *Motor vehicle.* — The term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(4) *Security.* — The term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(5) *Tax lien filing.* — The term "tax lien filing" means the filing of notice (referred to in subsection (a)) of the lien imposed by section 6321.

(6) *Purchaser.* — The term "purchaser" means a person who, for adequate and full consideration in money or money's worth,

acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324 —

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property, which is not a lien or security interest shall be treated as an interest in property.

(i) *Special rules.* —

(1) *Actual notice or knowledge.* — For purposes of this sub-chapter, an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for

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communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(2) *Subrogation.* — Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

(3) *Disclosure of amount of outstanding lien.* — If a notice of lien has been filed pursuant to subsection (f), the Secretary or his delegate is authorized to provide by regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

Aug. 16, 1954, c. 736, 68A Stat. 779; Feb. 26, 1964, Pub.L. 88-272, Title II, § 236(a), (c) (1), 78 Stat. 127, 128; July 5, 1966, Pub.L. 89-493, § 17(a), 80 Stat. 266; Nov. 2, 1966, Pub.L. 89-719, Title I, § 101(a), 80 Stat. 1125.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-856

THE PECOS COUNTY STATE BANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (App., *infra*, pp. 9–13) are not officially reported. The opinion of the court of appeals (Pet. App. A, 1a–29a) is reported at 466 F. 2d 1040.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 30a) was entered on September 7, 1972. A timely petition for rehearing (Pet. App. C, 31a–32a) was denied on October 31, 1972. The petition for a writ of certiorari was filed on December 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

494-010—73—1

QUESTION PRESENTED

Whether the government's federal tax lien had priority over petitioner's security interest in accounts receivable which came into existence more than 45 days after the notice of tax lien was filed.

STATUTES INVOLVED

Sections 6321 and 6323(c) of the Internal Revenue Code of 1954, 26 U.S.C. 6321 and 6323(c), are set forth at Pet. App. D, 32a–35a. Section 6322 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 6322, provides:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

STATEMENT

This case involves the priority of competing claims to an interpleaded fund of $14,690.10 owed by Texas Oil & Gas Corporation to the taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil & Gas Field Services. The United States claims the fund by reason of federal tax liens against the taxpayer for $54,746.40 representing unpaid withholding and FICA taxes assessed for taxable periods in 1969. Notices of lien were filed on February 27, 1970. Petitioner's claim to the fund derives from a security agreement given it by the taxpayer on March 25, 1967, in which the taxpayer agreed to factor his accounts receivable in considera-

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tion for periodic loans from petitioner. A financing statement describing the collateral covered by the security agreement was duly filed by petitioner on March 29, 1967 (Pet. App. A, 2a–4a).

During September, October and November 1970, Texas Oil & Gas became indebted to the taxpayer in the total amount of $14,690.10 on account of professional services and equipment furnished by taxpayer (Pet. App. A, 2a, 5a). Earlier, on December 26, 1969 and January 1, 1970, a delegate of the Secretary of the Treasury had made assessments against the taxpayer for federal withholding and FICA tax liabilities for the second and third quarters of 1969. Notices of lien were filed on February 27, 1970. In an effort to collect the tax, the United States caused a notice of levy to be served upon Texas Oil & Gas in an effort to seize the amount by which that corporation was indebted to the taxpayer (Pet. App. A, 5a).

Petitioner first became aware of the existence of the tax lien after October 22, 1970. Shortly thereafter, petitioner served notice on Texas Oil & Gas to pay over to it, pursuant to the security agreement, the same indebtedness levied upon by the United States. Texas Oil & Gas thereupon interpleaded the fund due to the taxpayer into the registry of the district court, pending a determination of priorities with respect thereto (Pet. App. A, 5a).

On cross motions for summary judgment, the district court determined that the tax liens of the United States were prior to petitioner's claim. The court of appeals affirmed (Pet. App. A, 2a). Both courts held

that the petitioner's lien with respect to the accounts receivable was not choate at the time the federal tax lien was filed or within 45 days thereafter so as to qualify for priority under Section 6323(c) of the Internal Revenue Code of 1954.

ARGUMENT

Section 6321 of the Internal Revenue Code of 1954 imposes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to a delinquent taxpayer. Section 6322 provides that the tax lien arises when the taxpayer's liability is assessed and continues in force until the assessment is satisfied or becomes unenforceable. Section 6323 provides that notice of lien must be filed before the lien is valid as against certain classes of creditors, including holders of security interests.

Once filed, the federal tax lien is fully perfected and complete and attaches to all of the taxpayer's property, both presently owned and subsequently acquired. *Glass City Bank* v. *United States,* 326 U.S. 265. Prior to 1966, in order to defeat the government's lien, a competing creditor had to show that his lien was "choate" at the time the federal lien was filed. *United States* v. *New Britain,* 347 U.S. 81; *United States* v. *Security Tr. & Sav. Bk.,* 340 U.S. 47; *Spokane County* v. *United States,* 279 U.S. 80. Choateness requires that the identity of the lienor, the property subject to the lien, and the amount of the lien, all be established. All three requirements of choate-

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ness had to be met before the competing lien was deemed perfected; a failure in any one respect subordinated the nonfederal claim to the tax lien. *United States* v. *New Britain, supra; United States* v. *Pioneer American Ins. Co.,* 374 U.S. 84.

In 1966, Congress completed a comprehensive revision of the provisions of the Internal Revenue Code concerned with the relationship of federal tax liens to the interests of other creditors. Federal Tax Lien Act of 1966, Pub. L. 89–719, 80 Stat. 1125. One of the changes effected by this Act was the addition of Section 6323(c), according a limited priority over duly filed federal tax liens to, *inter alia,* security interests arising under commercial transactions financing agreements entered into before the tax lien filing in certain cases where the funds were advanced, or the property referred to in the agreement came into existence, after the tax lien filing. This new priority was limited, however, to situations (1) where the loan or purchase was made without actual knowledge of the tax lien, and (2) the security interest attached to property in existence not later than 45 days after the tax lien filing. In other words, for certain types of accounts receivable and inventory financing the Act relaxed the requirement that the competing private lienor must have a choate lien which attached to existing specific property of the taxpayer, so long as the lien became choate within 45 days of the tax lien filing. Insofar as is here relevant, the choateness requirement for liens competing with the federal tax lien

remained otherwise unchanged. *Continental Finance Co., Inc.* v. *Cambridge Lee Metal,* 100 N.J. Super. 327, 241 A. 2d 853; *In re Rosenberg's Will,* 62 Misc. 2d 12, 308 N.Y.S. 2d 51. See Plumb and Wright, *Federal Tax Liens* 89 (2d ed.).

Although secured by a commercial transactions financing agreement, petitioner did not have a choate lien with respect to the Texas Oil & Gas receivables either at the time of the filing of notice of the government's lien or within 45 days thereafter. The Texas Oil & Gas receivables arose more than six months after the tax lien was recorded. Petitioner's claim to the receivables was inchoate both at the time the federal lien was filed and 45 days thereafter, because the property subject to the lien did not come into existence until more than 45 days after the date of filing. Moreover, petitioner apparently failed to check the records for the existence of a federal tax lien as contemplated by Congress. See S. Rep. No. 1708, 89th Cong., 2d Sess., p. 8. Instead, petitioner continued to make loans to taxpayer until October 1970, when it obtained actual notice of the existence of the federal lien. No showing was made that even the debt underlying its claim here arose prior to or within 45 days after the government's filing of its notices of lien. In these circumstances the courts below correctly concluded that petitioner's claim was inchoate at the determinative times under federal standards and that the federal lien was therefore superior.

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Petitioner suggests that the decision below, holding the government's lien perfected at the time of filing, is inconsistent with *United States* v. *New Britain, supra.* But in that case the Court simply held that, as to property held by a debtor at all relevant times, priority would be accorded to the liens first filed and perfected. Thus that decision does not support petitioner's contention that the government's lien here was unperfected until the receivables had come into existence. This case, unlike *New Britain,* involves after-acquired property. But petitioner's suggestion that a federal lien against such property attaches only at a time significantly later than the original assessment and filing is contrary to the clear language of Section 6322. Moreover, this Court held in *Glass City Bank* v. *United States, supra,* that a federal tax lien attaches to after-acquired property at the date of filing.

Petitioner's contention is also contrary to the express language of Section 6323. That Section by its terms covers after-acquired property as well as property in existence at the time of filing the government's notice of lien, and it explicitly limits the priority of private lienors to situations where the lien against the secured property is choate "before the 46th day after the date of tax lien filing." In short, it is the clear statutory purpose to subordinate private lienors as to property acquired more than 45 days after filing. See *Continental Finance Co., Inc.* v. *Cambridge Lee Metal, supra; In re Rosenberg's Will, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1973.

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APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Came on to be heard the above cause and the Court having heard and considered the evidence and argument of counsel and briefs filed, does make the following Findings of Fact, Conclusions of law and enters the following Judgment:

FINDINGS OF FACT

1. That the Plaintiff, Texas Oil and Gas Corporation, is a Delaware Corporation having its principal place of business at 2700 Fidelity Union Tower Building, Dallas, Texas.

2. That the Defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, is a resident of Fort Stockton, Pecos County, Texas.

3. That the Defendant, The Pecos County State Bank, is a Texas banking corporation having its principal place of business at 500 N. Main Street, Fort Stockton, Pecos County, Texas.

4. That prior to March 25, 1967, the defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, was engaged in the business of servicing and repairing oil wells and related equipment.

5. That on March 25, 1967, the defendant-taxpayer entered into a written "Security Agreement" with the defendant, the Pecos County State Bank, whereby the defendant-taxpayer agreed to factor his accounts receivable with the defendant bank as soon as they arose, in consideration for loans from the bank.

6. That contemporaneously with the execution of this Security Agreement, the Defendant bank executed a "Financing Statement" describing the collateral covered by the Security Agreement.

7. That this Financing Statement was filed with the Secretary of State of the State of Texas on March 28, 1967.

8. That the defendant bank continued to factor accounts receivable due to the defendant-taxpayer under the Security Agreement dated March 25, 1967, until on or about October 15, 1970.

9. That the defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, performed services on behalf of the Plaintiff, Texas Oil and Gas Corporation, which were completed some time in September of 1970.

10. That the Plaintiff is presently indebted to the defendant-taxpayer for the services performed by him in the total amount of $14,690.10.

11. That on December 26, 1969, a delegate of the Secretary of the Treasury made an assessment for the federal withholding and FICA tax liability for the second quarter of 1969 against the defendant-taxpayer, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, in the total amount of $34,284.08.

12. That on January 1, 1970, a delegate of the Secretary of the Treasury made an assessment for the federal withholding and FICA tax liability for the third quarter of 1969 against the defendant-taxpayer in the total amount of $20,832.93.

13. That on February 27, 1970, a Notice of Federal Tax Lien, reflecting the federal tax liability of Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, was filed with the County Clerk, Pecos County, Fort Stockton, Texas.

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14. That in an effort to collect the outstanding federal tax liability of the defendant-taxpayer, the United States of America, by and through its Internal Revenue Service, caused a Notice of Levy to be served upon the plaintiff, Texas Oil and Gas Corporation, which sought to seize the fund of money held by the plaintiff and due and owing to the defendant-taxpayer.

15. That shortly thereafter, the defendant, the Pecos County State Bank, served notice upon the plaintiff to pay over to it, pursuant to its Security Agreement with the defendant-taxpayer, the sum of money due and owing to the defendant-taxpayer.

16. That in an attempt to avoid personal liability, the plaintiff has tendered to the Registry of this Court the sum of money that it owes the defendant-taxpayer—$14,690.10—for a determination of the priority to such sum by this Court.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the subject matter of this action pursuant to Section 1335 of Title 28, United States Code.

2. That this Court has jurisdiction over the United States pursuant to Section 1340 of Title 28, United States Code and Section 2410 of Title 28, United States Code, which provides the requisite waiver of the sovereign immunity of the United States of America.

3. That the tax assessments made against the defendant-taxpayer herein, Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, create a lien in favor of the United States in the amount of his unpaid federal tax liability, which attaches to all property and rights to property, whether real or personnel, belonging to the defendant-taxpayer, including the fund of money interpleaded into the Registry of this

Court. Section 6321 of the Internal Revenue Code of 1954 (26 U.S.C. § 6321).

4. That the security interest existing in favor of the defendant, the Pecos County State Bank, and the basis of its claim for priority to the interpleaded fund, was executed and filed in accordance with the provisions of the Texas Uniform Commercial Code. Sections 9.302(a)(1) and 9.305, Vernon's Texas Code Annotated, Bus. & C.

5. That in determining the validity of the federal tax lien created by Section 6321 of the Internal Revenue Code of 1954, and in determining its priority as against state-created liens, federal law is controlling upon this Court. *United States* v. *Bess,* 357 U.S. 51 (1958).

6. That the issue before this Court as to the priority of the federal tax lien relied upon by the Government, vis-a-vis the state-created claim asserted by the Defendant bank, must be resolved by reference to Section 6323 of the Internal Revenue Code of 1954 which provides that a properly filed Notice of Federal Tax Lien is entitled to priority over a state-created security interest, such as the commercial transaction financing agreement relied upon by the defendant bank, unless the security interest meets the following requirements: (1) the identity of the lienor is established; (2) the amount of the loan is in existence within 45 days subsequent to the filing of the Notice of Federal Tax Lien, and (3) the property to which the security interest attaches is in existence within 45 days subsequent to the filing of the Notice of Federal Tax Lien. Section 6323(c)(2)(A)(ii) of the Internal Revenue Code of 1954 (26 U.S. § 6323(c)(2)(A)(ii)); *United States* v. *Ball Construction Company,* 355 U.S. 587 (1958); *First State Bank of Med-*

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ford v. *United States,* 166 F. Supp. 204 (D. Minn., 1958).

7. That the lien relied upon by the defendant, the Pecos County State Bank was not in an established amount nor was there identifiable property to which it attached until completion of the services performed by the defendant-taxpayer in September of 1970, a time subsequent to April 14, 1970, the expiration of the 45 day grace period after the filing of the Notice of Federal Tax Lien provided by Section 6323(c)(A)(ii) of the Code.

8. That based on the applicable provisions of federal law, the United States of America is entitled to priority to the interpleaded fund over the defendant, the Pecos County State Bank.

9. That the Plaintiff, as a disinterested stake-holder, is not entitled to attorney's fees in this action as the total amount in the fund is insufficient to satisfy prior federal tax liens. *United States* v. *State National Bank of Connecticut,* 421 F. 2d 519 (C.A. 2, 1970); *United States* v. *Ray Thomas Gravel Co.,* 380 S.W. 2d 576 (Tex., 1964).

10. That the United States is accordingly entitled to the entire amount of the fund interpleaded into the Registry of this Court.

JUDGMENT

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the District Clerk, be, and hereby is directed to pay to the United States of America the entire amount of the fund interpleaded into the Registry of this Court in this case, and that the Defendants, The Pecos County State Bank and Hilton R. Blackmon, d/b/a Blackie's Oil and Gas Field Service, take nothing.

Entered this 9th day of November, 1970.

ERNEST GUINN,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1978